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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEO BURROUGHS, JR., et al.,

Petitioners,

v.

CARLA HILLS, Secretary, Department of Housing and Urban Development, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether neighbors of residential property owned by the Department of Housing and Urban Development ("HUD") have a private right of action to seek damages from HUD and its agents under the National Housing Act, arising from the rapid deterioration of the property during HUD ownership and the resulting deleterious impact of that deterioration upon those neighbors and their families.

2. Whether the district court properly exercised its discretion to deny costs to a prevailing party under Rule 54(d) of the Federal Rules of Civil Procedure, on the grounds that the lawsuit was brought by plaintiffs of limited means to resolve novel questions of "considerable public interest and importance" rather than to obtain private gain.

RULE 21 STATEMENT

The proceedings below were brought by Leo Burroughs, Jr., Esther Robinson, Donald Schatz, Earl Whatley, Steven Goldsmith, Anton Seals, Ishmael Seye, Lizzie Mae Bonner and the Five Block Club. These parties are petitioners in this Court. Appellees below included Carla Hills, as Secretary of the United States Department of Housing and Urban Development; John Waner, Martin Rogan, William Miller, John Davis, and Stanley Nykiel, individually and in their official capacities as agents of the United States Department of Housing and Urban Development; and Seward Rist. These parties are respondents in this Court.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Leo Burroughs, Jr., Esther Robinson, Donald Schatz, Earl Whatley, Steven Goldsmith, Anton Seals, Ishmael Seye, Lizzie Mae Bonner and the Five Block Club respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 741 F.2d 1525 (7th Cir. 1984) and is set forth in Appendix A. The Seventh Circuit's denial of rehearing en banc is not reported and is set forth in Appendix B. The district court's final order on summary judgment is reported at 564 F.Supp. 1007 (N.D. Ill. 1983) and is set forth in Appendix C. The district court's minute order on the issue of costs is not reported and is set forth in Appendix D. The district court's ruling on the motion to dismiss is not reported and is set forth as Appendix E.

JURISDICTION

On August 15, 1984, the United States Court of Appeals for the Seventh Circuit entered judgment against

appellants-cross-appellees. On October 22, 1984, the Seventh Circuit denied cross-appellees' petition for rehearing and suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTES INVOLVED

The relevant provisions of the National Housing Act and related statutes and regulations are set forth in Exhibit F.

STATEMENT OF THE CASE

In November, 1974, pursuant to Section 204 of the National Housing Act, 12 U.S.C. § 1710, the United States Department of Housing and Urban Development ("HUD") acquired title to a three story residence in the South Shore community of Chicago, after entry of a decree of foreclosure. HUD held title

to the property for a period of approximately twenty months.

The parties have stipulated that during HUD's stewardship, the property became infested with rodents, and the building on the property fell into serious disrepair.*/ The building also became a frequent target of vandals. For the 20-month period during which HUD held legal title, the net market value of the property fell from approximately $23,000 to $0.

Petitioners brought the deteriorating condition of the property to the attention of several of the defendants in a face to face meeting in which the petitioners presented a community petition declaring the property "a

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*/ This case was presented to the district court pursuant to a stipulation of facts agreed to by all parties.

clear and present danger." Petitioner's efforts, however, proved fruitless; other than paying its monthly fee to the Area Management Broker, HUD expended a total of only $285.00 to maintain the property in the entire 20 month period during which it held title.

In view of HUD's neglect of this property and HUD's documented neglect of thousands of other like properties in Chicago and throughout the nation, plaintiffs filed this action in April, 1976, under the National Housing Act and principles of pendent jurisdiction. 28 U.S.C. § 1331. The individual plaintiffs, residents of apartments located within 500 feet of the HUD owned property, together with the Five Block Club, a voluntary community organization, named as defendants the HUD officials

(the "federal defendants") responsible for the building and the Area Management Broker (Seward Rist) hired by HUD to maintain the property. Plaintiffs sought relief arising from defendants' neglect of the property in violation of the National Housing Act, state law, and a Chicago ordinance.*/

In October, 1978, District Court Judge Leighton denied the defendants' motion to dismiss plaintiffs' claims, finding that the complaint stated a cause of action for violation of the National Housing Act. See Appendix E. After further discovery, the parties

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*/ While suit was pending, the property was sold by HUD to the City of Chicago for $1.00 under the Property Release Option Program. The City subsequently reconveyed the property to the South Shore Senior Citizens Center. HUD's sale of the property rendered moot plaintiffs' prayer for injunctive relief.

stipulated to the relevant facts concerning the condition of the building and the nature of plaintiffs' injuries. Specifically, as the parties stipulated, the deteriorated condition of the building during HUD's ownership interfered with petitioners' leasehold interest in the surrounding property and caused petitioners to fear for the health, safety and welfare of the neighborhood.

Each party then filed cross-motions for summary judgment. In March, 1983, District Court Judge Moran granted summary judgment in favor of the defendants, finding that, although plaintiffs had a private right of action for injunctive relief under the National Housing Act and state law, plaintiffs could not maintain an action for damages. See Appendix C. The Seventh Circuit affirmed

Judge Moran, in a per curiam opinion with three separate concurring opinions. The Seventh Circuit ruled that petitioners had no private right of action under the National Housing Act or state or local law. See Appendix A.

After Judge Moran ruled on the cross-motions for summary judgment, the federal defendants submitted a Bill of Costs amounting to $1,133.65 (corrected). Plaintiffs objected to the Bill on a timely basis, on the grounds that this case was brought in good faith by individuals of limited means to vindicate the public interest in realizing the national housing goals established by Congress as well as the statutory mandates created by the State of Illinois and the City of Chicago. After full briefing on the issue, District Judge

Moran denied costs to the federal defendants, exercising his equitable discretion under Rule 54(d), Fed.R.Civ.P. See Appendix D. In three separate concurring opinions, the Seventh Circuit reversed the order below, held that Judge Moran abused his discretion under Rule 54(d), and awarded costs to the defendants. See Appendix A. The Court of Appeals subsequently denied petitioners' petition for rehearing on the issue of costs. See Appendix B.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION ERRONEOUSLY DEPRIVES PETITIONERS OF THE MEANS OF GIVING SUBSTANCE TO THE NATIONAL HOUSING POLICY.

This petition raises substantial issues concerning the maintenance and

control of properties acquired by HUD through foreclosure under the National Housing Act. During the period involved in this lawsuit, the General Accounting Office estimated that HUD owned approximately 45,000 such properties nationwide. The GAO also reported that the deterioration of these HUD-owned properties in the mid-1970's created health and safety hazards and contributed to the physical deterioration of neighborhoods around the country. This lawsuit represents one community's response to HUD's neglect of its statutory duties by those victimized by the rapid deterioration of a single family residence entrusted to HUD's care on the south side of Chicago.

In 1937, Congress declared that it was the policy of the United States "to remedy the unsafe and unsanitary housing conditions and the acute

shortage of decent, safe, and sanitary dwellings for families of low income, in rural and urban communities, that are injurious to the health, safety and morals of the citizens of the Nation." Housing Act of 1937, 42 U.S.C. § 1401 (1940). Twelve years later, in its formal declaration of the national housing policy, Congress set the following objectives of government housing policy:

> housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and suitable living environment for

> every American family . . . .

Housing Act of 1949, 42 U.S.C. § 1441. To insure this result, Congress declared further that

> [t]he Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective thereby established . . . .

Id.

Almost twenty years later, in recognition of the fact that the nation had "not directed sufficient attention and resources to the preservation of

existing housing and neighborhoods," 42 U.S.C. § 1441a (b), Congress declared:

> a greater effort must be made to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance, in conjunction with the provision of adequate municipal services. Such an effort should concentrate, to a greater extent than it has in the past, on housing and neighborhoods where deterioration is evident but has not yet become acute.

Housing and Urban Development Act Amendments, 42 U.S.C. § 1441a (c).

To implement these Congressional objectives, HUD issued a Property Disposition Handbook requiring that "immediate attention shall be given to those repairs required to prevent undue deterioration

and eliminate hazardous conditions that may be dangerous to the public." HUD Handbook, Chapter 2, Paragraph 23. The Handbook further provides that "[e]very possible precaution shall be taken to eliminate conditions which may contribute to injury or damage to the person or property of others." HUD Handbook, Chapter 3, Paragraph 70.

Notwithstanding the clarity and purpose of Congress' expressed intent and HUD's supposed understanding of that intent as reflected in its Handbook, HUD in fact chose simply to ignore many of the properties it acquired through foreclosure under Section 204 of the National Housing Act. 12 U.S.C. § 1710. Although empowered to "deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in

its discretion" the property which is the subject of this action in a manner consistent with the national housing policy, 12 U.S.C. § 1710(g), HUD instead became the slum landlord of this property and thousands others like it throughout the nation. Nationwide, the General Accounting Office estimated that in the twelve month period ending April 30, 1976, HUD's neglect contributed to an average loss of over $9,300 on each HUD-owned property, a total one year loss of over $610 million.

The Court of Appeals' decision effectively denies petitioners and others in their position, the victims of HUD's neglect, their only meaningful legal means to require HUD officials to live up to their statutory duties with respect to these properties. The Court

of Appeals refused to imply a private right of action for damages against HUD officials on behalf of the petitioners, citing Cort v. Ash, 422 U.S. 66 (1975), and its progeny. The Court's opinion, however, turns Cort on its head. Although the analysis suggested by Cort and its progeny was formulated as a means of identifying Congressional intent, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377-78 (1982), the Court of Appeals' decision purports to rely upon Cort to justify a result totally contrary to the national housing policy and the expressed intention of Congress.

There is no dispute that the language of the pertinent housing statutes and the legislative history of their enactment is silent on the private

right of action issue. As this Court has recognized time and again, however, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). The Court of Appeals' decision in this case reflects no consideration of the language or structure of the relevant statutes or the circumstances of their enactment.

Writing for the Court of Appeals, Judge Nichols noted that he

could find no evidence to suggest that neighbors of deteriorating and abandoned HUD-owned properties were intended by Congress to be special beneficiaries of the Housing Act. Rather, Judge Nichols asserted that the primary beneficiary is the government itself, because the "object of administration between foreclosure and disposal is clearly to limit or avert the government's fiscal loss, and replenish the insurance fund . . . ." A-10. While it is surely true that Congress intended by these provisions to maintain the integrity of the mortgage insurance funds, it is also true that the declared national housing policy is to ensure "a decent home and suitable living environment for every American family" by "preservation of existing housing and neighborhoods" and by focusing

national housing efforts "on housing and neighborhoods where deterioration is evident but has not yet become acute." 42 U.S.C. §§ 1441, 1441a(b)-(c). Judge Nichols' conclusion also overlooks the findings of the congressional study which first inspired the declaration of the national housing policy in 1949. The final majority report of the Joint Committee on Housing explained in 1948 that

> any comprehensive attack on our housing problems must necessarily deal with the problem of slum and blighted areas which are threatening the health and welfare of our people. Approximately a fifth of our urban population lives in slum areas which are the breeding ground of disease and ill health, crime and juvenile delinquency.

House Rpt. No. 1564, 80th Congr. 2d Sess. (March 15, 1948). See also Senate

Rpt. No. 84, 81st Congr. 1st Sess. (February 25, 1949).

In his concurring opinion, Judge Posner suggests that "[w]hen the statute speaks of 'a suitable living environment,' 'the preservation of existing housing and neighborhoods,' and 'neighborhood disintegration' and 'deterioration,' it is referring not to the neighbors of the subsidized homeowners but to the subsidized homeowners themselves." A-27. Judge Posner would define "neighborhood" simply as "the area where the inhabitants of subsidized housing live." Id. Ironically, however, Judge Posner's reading of the statute misses the crucial fact that there are no subsidized homeowners of properties on which HUD has foreclosed the mortgage; the abandonment of these

properties is actually part of the problem. Moreover, the "area" around these abandoned HUD-owned properties is more than simply a collection of buildings or a theoretical legal concept. The "area" to which Judge Posner refers is inhabited by real people whose daily well-being is threatened by the same health and safety dangers which prompted Congress to enact and subsequently reaffirm the national housing policy.

Each of the three separate opinions in the Court of Appeals reflects the presumption that a court should imply no private right of action when the statute and the legislative history are silent on the issue. If the proper inquiry is truly one of identifying Congressional intent, however, this approach overlooks that Congress' silence

on the private right of action issue may simply reflect the accepted legal principles recognized during the period the statute was considered and enacted. However appropriate the Court of Appeals' presumption might be with respect to statutes passed after Cort was decided, the presumption is likely just the opposite of Congress' actual intent with respect to statutes such as the National Housing Act which were considered and enacted before Cort. This Court and others repeatedly held prior to Cort that a statute enacted for the benefit of a particular class presumptively afforded a remedy for members of that class injured by violations of the statute. Texas & Pacific Railway v. Rigsby, 241 U.S. 33, 37-40 (1916). See generally Middlesex County Sewerage

Authority v. National Sea Clammers Assoc., 453 U.S. 1, 22-26 (1981) (Stevens, J. concurring). This long line of authority was the law when Congress considered and declared the national housing policy in 1949. To presume that Congress in 1949 intended a result contrary to this authority is to engage in a fiction not faithful to the legislative history.

While the recent presumption against the implication of private rights of action may accurately reflect Congress' intent in the context of certain regulatory and securities statutes, this presumption runs directly counter to Congress' intent in the context of statutes which entrust in the federal government the duty to manage and control property or resources for the benefit of an identifiable class of

persons. In United States v. Mitchell, 103 S.Ct. 2961 (1983), for example, this Court held that private allottees of land in Indian reservations could sue the United States for money damages suffered as the result of the Secretary of Interior's mismanagement of Indian lands even though the various statutes under which the allottees sued and the legislative history of those statutes were silent as to the allottees' private right of action. In Mitchell this Court found that legislative pronouncements that the Secretary of Interior must consider "the needs and best interest of the Indian owner and his heirs," and internal regulatory mandates of the Secretary of the Interior to "manag[e] the Indian forests so as to obtain the greatest revenue for the Indians consis-

tent with a proper protection and enforcement of the forests" were sufficient evidence of Congress' intent to create in the Secretary of Interior an affirmative duty enforceable by the allottees of Indian lands by means of a private right of action for money damages in the event of mismanagement. 103 S.Ct. 2961, 2972. While the history of housing legislation is not nearly as lengthy as the history of American Indian legislation, the national housing policy is no less important to those communities which depend upon HUD's faithful performance of its statutory duty to manage and control the properties it acquires through foreclosure.

In addition to affording neighbors of deteriorating HUD-owned properties the right to recover for

actual injuries suffered as the result of HUD's neglect, the implication of a private right of action in this context will deter HUD's nonfeasance in the future and thereby give substance to the national housing policy for the thousands of properties acquired by HUD. Estrada v. Hills, 401 F.Supp. 429, 439 (N.D. Ill. 1975). Cf. Mitchell, 103 S.Ct. 2961, 2973. Although deterrence is a principal goal of this lawsuit, the three separate opinions in the court below do not address the deterrence effect of this action directly.*/

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*/ Judge Flaum's opinion suggests that the problems underlying the HUD property disposition program may be complex and that the deterrence effect of awarding money damages may be "speculative." A-31. The likelihood that money damages would deter such conduct in the future is substantially greater, however, than the unstated assumptions underlying the observation of Judge Flaum.

Writing for the Court, Judge Nichols posited instead that money damages "would tend to make HUD management reluctant to foreclose." A-12. This result, however, even if true, would cause no more damage to the rights of neighbors and no greater drain on the mortgage insurance fund than the result of HUD's existing policy of neglect. Moreover, if HUD failed to foreclose on such properties, many of the dwellings would be inhabited and one of the major causes of the problem illustrated by this case eliminated.

Judges Posner and Flaum suggest that the award of damages in this case would divert funds from other valuable housing programs. A-27, A-31. The funds theoretically diverted, however, are funds which should have been spent

on the maintenance of the property in the first instance. The Court's reasoning presumes that other housing programs are more important to the realization of the national housing policy than the property maintenance and disposition program to which petitioners seek to give substance in this case. Neither the statute nor any of the circumstances of its enactment support this presumption. Moreover, the Court's reasoning overlooks that, had the defendants fulfilled their statutory obligations, HUD would have expended far more for proper maintenance than the amount of damages stipulated to by the parties in this case.

The end result of the Court of Appeals' decision is to deprive petitioners of the only means of enforcing the national housing policy in the

context of the HUD property maintenance and disposition program. This result is the single least likely to reflect Congress' actual intent. This Court should grant certiorari to give effect to that intent and to make clear that the doctrine of implied private rights of action should not be relied upon as a means of sapping federal statutes of their substance and meaning.

II.

THE COURT OF APPEALS' DECISION ON COSTS IS CONTRARY TO THE ORIGIN AND PURPOSE OF RULE 54(d)

This petition also raises substantial issues concerning the scope of the district court's discretion to deny costs under Rule 54(d) of the Federal Rules of Civil Procedure.

District courts in the past have applied widely diverging and often conflicting criteria in determining whether to tax costs and in what amount. The courts of appeals have offered only limited guidance on the question. The three appellate opinions in this case are fragmented and inconsistent. Only review by this Court can resolve these inconsistencies and afford future litigants the opportunity to assess the risks inherent in the effort to vindicate statutory rights in the federal courts.

Rule 54(d) of the Federal Rules of Civil Procedure provides:

> Except when express provision is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party

> unless the court otherwise directs. . . .

In Popeil Brothers, Inc. v. Schick Electric, Inc., 516 F.2d 772, 774-75 (7th Cir. 1975), the Seventh Circuit acknowledged that Rule 54(d) embodies the historical principle that costs should be awarded to the prevailing party unless equity and good conscience warrant a different result. See Newton v. Consolidated Gas Co., 265 U.S. 78, 83 (1924); Hodgman v. Atlantic Refining Co., 20 F.2d 949, 951 (D. Del. 1927). In the present case, the district court exercised this equitable discretion and denied costs to the prevailing party on the basis that plaintiffs' case "present[ed] novel questions of considerable public interest and importance, was brought by plaintiff[s] of limited means

to seek answers to those questions rather than for commercial advantage or private gain, and was litigated in that context." Appendix D. Finding these factors insufficient, the Seventh Circuit declared that the district court abused its discretion in denying costs to the federal defendants.

The Court of Appeals' narrow construction of the permissible scope of equitable discretion afforded the district court is contrary to the origin and purpose of Rule 54(d). As a principle of equity, the presumption in favor of awarding costs to the prevailing party is not a rigid or mechanical rule. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946). Rather, the presumption applies unless there is "an element of injustice in a

cost award." Delta Air Lines, Inc. v. August, 450 U.S. 346, 355, n.14 (1981).

In the present case, the district court found an element of injustice in requiring plaintiffs of limited means to pay the costs of the federal government in litigation brought to advance important public rather than private interests. The district court's consideration of each of these factors is consistent with the practice of other federal courts of appeals. See, e.g., National Organization For Women v. Bank of California, 680 F.2d 1291, 1294 (9th Cir. 1982) (affirming district court's decision not to award certain costs because of losing plaintiffs' "limited budgets"); Rural Housing Alliance v. U.S. Department of Agriculture, 511 F.2d

1347, 1350 (D.C. Cir. 1974) (noting that court's discretion under Fed. R. App. P. 39(a) should be exercised in a way which does not discourage public interest plaintiffs from raising their claims in court); Berner v. British Commonwealth Pacific Airlines, Ltd., 362 F.2d 799, 801 (2d Cir.), cert. denied, 385 U.S. 948 (1966) (within district court's discretion to determine whether costs should be taxed against widow and children on whose behalf action was brought in good faith).

The proper scope of equitable discretion under Rule 54(d) was well analyzed in County of Suffolk v. Secretary of the Interior, 76 F.R.D. 469 (E.D.N.Y. 1977), cert. denied, 434 U.S. 1064 (1978). In County of Suffolk, various public service organizations with "limited

resources" brought suit to challenge a proposed lease sale of certain offshore sites in the federally-owned outercontinental shelf. Although plaintiffs' complaint ultimately was dismissed, the district court refused to tax costs in favor of the defendants after considering the full range of factors which define the proper scope of the district court's equitable discretion under Rule 54(d). The factors include:

> (1) was the action brought and carried forward in good faith; (2) did its prosecution provide direct or indirect benefits to the public; (3) did it result in direct or indirect benefits to defendants; (4) were novel and substantial issues of law or fact resolved; (5) are costs required to reimburse needy ["prevailing"] defendants; (6) will the costs unduly burden non-affluent ["losing"] plaintiffs; (7) and

> will imposition of costs unduly inhibit future challenges to environmental decisions, thus reducing the effect of substantive environmental protections?

See also Black Hills Alliance v. Regional Forester, 526 F. Supp. 257, 256-60 (D.S.D. 1981) (awarding costs to losing plaintiff in part because plaintiff was of limited means and brought environmental suit in good faith to advance public interest); Schaulis v. CTB/McGraw Hill, Inc., 496 F. Supp. 666, 680 (N.D. Cal. 1980) (declining to award costs to prevailing defendant in Title VII suit because of plaintiff's "modest means").

As evidenced by its order denying costs to the federal defendants, the district court's decision was informed by consideration of the full range of these equitable factors, taken

in light of its familiarity with the facts and its first-hand knowledge of the handling of this case by the parties. In contrast, the three concurring opinions of the Court below exhibit little or no consideration for the equities of this case or the equities underlying Rule 54(d). Senior Judge Nichols, acknowledging that plaintiffs "had a legitimate grievance, whether or not a cause of action," concluded without further explanation that because costs are a "normal consequence of losing," the equities upon which the district court relied were not sufficient to avoid the general rule of awarding costs to the prevailing party. A-14.

The meaning of Judge Nichols' rationale is unclear. If Judge Nichols' opinion means that the district court

should not have considered the limited nature of plaintiffs' resources, the public interest nature of this lawsuit, or the fact that many of the issues raised were issues of first impression, that opinion is contrary to the equitable heritage of Rule 54(d). On the other hand, if Judge Nichols' opinion reflects simply a de novo reweighing of the equitable factors previously considered by the district court, that opinion intrudes upon the discretion traditionally and properly reserved to the district court. Shima v. Brown, 140 F.2d 337 (D.C. Cir. 1943). In either event, Judge Nichols' concurring opinion affords no basis for reversal of the district court's order denying costs.

In his concurring opinion, Judge Posner declares that plaintiffs'

limited means "is entitled to little weight in a case such as this where the defendants are . . . public officials whose expenses of suit were borne by the United States, which is to say by the federal taxpayer." A-25. While Judge Posner may be correct that individual federal taxpayers are also of limited means, this analysis is far removed from the equities underlying Rule 54(d). The proper comparison for purposes of Rule 54(d) is between plaintiffs and the federal treasury, not plaintiffs and individual taxpayers. The financial burden plaintiffs imposed upon the federal treasury and even individual taxpayers by bringing and maintaining this suit is negligible at best; the burden the Court's decision places upon plaintiffs for attempting to

vindicate the policies and goals of the National Housing Act and state and local law is severe.

Although the Seventh Circuit acknowledged in Popeil Brothers, Inc. v. Schick Electric, Inc., 576 F.2d 772, 776 (7th Cir. 1975) that the prevailing party properly could be denied costs in cases involving landmark issues of national importance, Judge Posner's opinion states that "[n]o one takes the landmark argument for forgiving the loser's costs that seriously. . . ." A-26. In the present case, Judge Posner reasons that plaintiffs' attempt to protect and enforce what they perceived to be their rights and the rights of their neighbors under the National Housing Act as well as state and local law "had no reasonable chance of succeeding" and plaintiffs

should not be "rewarded" by denying costs to the prevailing party. Id. Judge Posner's analysis, however, overlooks the premise of the equitable discretion reserved to the district court under Rule 54(d). What is at stake here is the ability of private individuals of limited means to bring suit to advance public rights and public interests as those rights and interests are defined by Congress. No court and no party has ever disputed plaintiffs' good faith in bringing such a suit.

Judge Posner's critique of the merits of plaintiffs' claim also overlooks the opinions of those federal courts which have found merit in private individuals' right to sue public officials under the National Housing Act. In Estrada v. Hills, 401 F. Supp. 429, 433

(N.D. Ill. 1975), for example, Judge Prentice Marshall declared, in a case very similar to this, that the Secretary of HUD could be sued for money damages in connection with his conduct purporting to carry out the statutory and regulatory provisions of the National Housing Act. In the present case, Judge Leighton declared that plaintiffs stated a claim against defendants under the National Housing Act. Even Judge Moran, who granted summary judgment in favor of the defendants, found that plaintiffs could have obtained injunctive relief against the defendants under the National Housing Act. As reflected in his order denying costs to the federal defendants, Judge Moran also found that plaintiffs brought this claim in good faith. In his concurring opinion,

Judge Flaum acknowledges that this case "may have presented novel questions of public interest and importance." A-34. Against this backdrop, Judge Posner's critique on the likelihood of success of this lawsuit should not obscure the real and legitimate interests plaintiffs sought to advance.

Judge Flaum's concurring opinion states that the district court's denial of costs was an abuse of discretion because costs can be denied a prevailing party only if it engages in misconduct in the course of the litigation or if the losing party is indigent. A-34. It is undisputed that the federal defendants engaged in no misconduct and that plaintiffs do not fall within the formal definition of indigency. However, as already discussed, the equitable

discretion of the district court under Rule 54(d) is much broader than that allowed in Judge Flaum's opinion. See discussion at pp. 29-36, supra. Judge Flaum declined to recognize the broader scope of that discretion because, from his perspective, costs are relatively insignificant and, accordingly, "there is no realistic concern that awarding costs to the defendants here will discourage persons from attempting to vindicate their rights in federal court." A-34. Judge Flaum's conclusion, however, overlooks the affidavit filed in the district court by plaintiff Leo Burroughs, Jr., former president of the Five Block Club. From Mr. Burroughs' perspective, the costs of this litigation are extremely significant. In his affidavit, Mr. Burroughs states that

"[a]ny order requiring the plaintiffs to pay the costs requested would work significant and severe economic hardship upon the plaintiff." The court's order imposing such a significant and severe economic hardship on these plaintiffs will discourage future plaintiffs of limited means from attempting to vindicate their rights and, even more disturbing, the public interest, in federal court.

In Boas Box Co. v. Proper Folding Box Corp., 55 F.R.D. 79 (E.D.N.Y. 1971), the court declined to award costs to the prevailing plaintiff because the taxation of costs against the defendant, a "small business struggling to stay alive . . . might very well prove disastrous to the company." Id. at 81. Although the defendant company did not

fall neatly within the formal definition of indigency, the court recognized in the exercise of its equitable discretion that "[i]t would be unfortunate if the threat of the imposition of the ever-increasing costs of litigation were to prevent a party . . . from defending with full vigor a case which it reasonably thought should be decided in its favor. . . ." Id. The court continued:

> It may well be desirable that the potential cost of unsuccessful litigation should act as a deterrent to litigation and an incentive for the parties to settle. But where the antagonists are very unevenly matched in size, resources, and stability, it would be unfortunate to use the possible taxation of costs as a sword of Damocles and so prevent a good faith defense. It is to inevitate such a result

> that the court's discretion is employed in such instances.

Id. Similarly, it would be unfortunate and unfair for this Court to countenance a rigid and formalistic rule on the taxation of costs as a sword to deter future public interest litigation brought in good faith by plaintiffs of limited means.

The inconsistencies of prior decisions on the scope of the district court's discretion under Rule 54(d) reflect that the equities of each case are unique. District courts as well as potential litigants need a consistent framework from this Court with which to assess those equities in a spirit true to the heritage of Rule 54(d). That framework should permit the district court to weigh the historical presumption

in favor of taxing costs for the prevailing party against the public interest character of the lawsuit, the relative merit and significance of the losing party's position, and the capability of the losing party to pay the costs of the prevailing party without extreme hardship.

CONCLUSION

For the reasons set forth above, petitioners respectfully urge that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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